Mr. SCOTT. Before proceeding to the reading of the papers, I move that the Committee for the Selection of Honorary Members of the Society be called upon to report.

Professor Woolsey submitted the following report:

REPORT OF THE COMMITTEE ON HONORARY MEMBERS.

April 29, 1910.

The Committee appointed for the selection of an honorary member of the American Society of International Law for the year 1909 reports the name of the Honorable T. M. C. Asser, of Holland, Minister of State, member of the Council of State, member of the Permanent Court of Arbitration, member of the Institute of International Law, and corresponding member of the Institute of France

T. S. WOOLSEY.
J. H. RALSTON.
GEO. G. WILSON.

(It was moved and seconded that the report of the Committee be accepted. The motion was agreed to.)

The CHAIRMAN. We are to have the pleasure of hearing this morning a discussion of the subject *The place of denial of justice in the matter of protection* by Professor Eugene Wambaugh.

ADDRESS OF PROF. EUGENE WAMBAUGH, OF HARVARD LAW SCHOOL,

ON

The Place of Denial of Justice in the Matter of Protection.

That a nation has the right and the duty to give protection to its citizens even when they are abroad is a doctrine wholly devoid of novelty. This is obvious from the practice of the Roman Republic two thousand years ago. There are several pertinent passages in the orations of Cicero. Two extracts from his attack on Verres for maladministration in a Roman province will suffice to show that the Roman Government protected Roman citizens in foreign countries, among other things, protected them from unjust procedure in the courts. The first is this:

If any king, if any foreign state, if any people had done to Roman citizens anything like this, would we not publicly seek redress? Would we not wage war? Could we permit this injustice and disgrace to the Roman name to go forgotten and unpunished? How many great wars do you think our ancestors undertook because Roman citizens were said to have been dealt with unjustly, shipmasters detained, merchants plundered?[1]

The second is this:

Verres, if you had been seized in Persia or in the farthest corner of India, and had been dragged off to punishment, what other cry would you have raised than "I am a Roman citizen!" And if that noble and illustrious title of citizenship would have availed you, a stranger among strangers, among barbarians, among men at the very ends of the earth. . . .[2]

But I have quoted enough for my purpose.

Cicero, it will be noticed, did not analyze or classify the instances wherein there was interposition. He merely pointed out that as to matters of all sorts the dignity of the Roman Republic required an insistence upon just treatment for Roman citizens in all parts of the world. Even Grotius did not in this matter indulge in analysis or classification. After quoting from Cicero and other authors, he simply added:

But yet it is not always, even if the cause of a subject be just, that it obliges the rulers to enter upon a war; but then only, if it can be done without the damage of all, or the greater part, of the subjects.[3]

Pufendorf, like Grotius, dealt with this subject as part of the general head of causes of war; and, though he dealt with it at considerable length, his chief contribution was his pointing out the theory upon which a government is held responsible for wrongs done by individuals, as to which matter he said:

And the governours of commonwealths are presumed to know what their subjects openly and frequently commit, unless the contrary of it be manifestly proved.[4]

[1] Cicero, *In Verrem Actio Secunda, lib.* V, *cap.* 58.

[2] *Ibid, lib.* V, *cap.* 64.

[3] Grotius, *De Jure Belli ac Pacis*, II, 25, 2 (Whewell's translation).

[4] Pufendorf, *De Jure Naturæ et Gentium*, VIII, 6, 12 (Kennet's translation).

It would be easy to trace the growth of the literature; but the present purpose, in accordance with the general scheme of papers to which this paper belongs, is merely to point out, somewhat after the fashion of the analytical jurists, what is the place which denial of justice occupies in the more general topic of protection to citizens residing abroad. The purpose, then, being analytical rather than historical or descriptive, the result to be achieved will be, as far as is practical, a definition of the senses in which the phrase denial of justice is used and a very brief indication of those general principles which are naturally developed by making such an analysis.

Denial of justice has at least two meanings. The wider meaning includes the shortcomings — that is to say, the misconduct or the wrongful inaction — of any one of the three departments into which Aristotle [5] divided government, namely, the executive, the legislative, and the judicial. Justice may be denied by the executive department in many ways, and, among others, by refusing to perform its contracts, provided there is no redress in the courts,[6] or by seizing persons or property, with the same proviso,[7] or by merely neglecting to use due diligence to prevent mob violence and the like depredations.[8] Justice may be denied by the legislative department either through passing discriminatory laws, for example, laws preventing fair access to public schools, or through failing to pass such laws as are requisite for the equal protection of aliens, for example, laws giving to aliens, as to citizens, compensation for injuries due to the negligence of another resulting in death.[9] Justice may be denied by the judicial department through improperly giving judgment against the alien in either civil or criminal cases, or through inflict-

[5] Aristotle, Politics, book vi, c. xiv, as quoted in 1 Thayer's Cases on Constitutional Law, 1.

[6] Instances are collected in 6 Moore's Digest of International Law, 717–738.

[7] Instances are collected in 6 Moore's Digest of International Law, 756–786, 883–949.

[8] Instances are collected in 6 Moore's Digest of International Law, 791–883.

[9] This example was suggested by a Pennsylvania statute which is construed as giving, in case of death by wrongful act, a preference to such surviving relatives as are citizens; but this Pennsylvania statute is understood to discriminate merely against aliens who are nonresidents. See Maiorano *v.* Baltimore and Ohio Railroad Co., 213 U. S. 268 (1909).

ing upon him an excessive punishment, or through depriving him of proper witnesses, or through refusing him any access whatever to the courts.[10]

As has been said, denial of justice is a phrase used in two senses. In the narrower sense, the phrase is restricted to the instances where the wrong has been done through misconduct or inaction whose nature is judicial. This restricted meaning seems to be preferable to the wider one which has just now been explained; for denial of justice, at least when the expression is used by a lawyer, naturally connotes the instrumentalities whereby normally justice is secured, that is to say, courts and judicial procedure.

Nevertheless, although the wider sense of the phrase denial of justice — the sense including shortcomings by any one of the three departments — seems to be the less natural one, it certainly is not the wrong one; and, besides, an examination of the instances coming within the wider use of the phrase throws a useful light upon the principles applicable to cases coming within the scope of the narrower meaning. Indeed, a study of denial of justice in any one of the three departments of government gives material aid in studying denial of justice in any other one of these departments. Thus, it is from denial of justice by the executive department, whether exercising its civil or its military functions, that one most clearly perceives the possibility of doing the wrong either positively, through performance of improper acts, or negatively, through negligence of duties. Further, it is from denial of justice by the legislative department that one most clearly perceives the impossibility of securing a remedy otherwise than through an indemnity, and the necessity of making an appeal for redress to the executive department alone; for repeal can not atone for the wrong which has already been done, and, besides, there is no mode whereby a foreign government can approach in behalf of its citizens any department other than the executive. Finally, it is from denial of justice by the judicial department that one most clearly sees the possibility of doing the wrong either by making aliens the objects of unfriendly discrimination or

[10] Instances are collected in 6 Moore's Digest of International Law, 651–705, and 3 Moore's International Arbitrations, 3119–3160.

by inflicting injustice upon all persons whomsoever; for the courts or their procedure may, by reason of prejudice, deny justice to aliens only, or may, by reason of unskillfulness, deny justice to all.

By combining and generalizing the points thus gained through examining denial of justice in each one of the three departments, it is seen that in all departments denial of justice may be active or passive, must result in an appeal to the executive for indemnity only, and can indicate either discrimination against aliens or the treatment of aliens in a manner which, though unjust, is quite as good as that which is granted to citizens.

Here emerge the three somewhat inconsistent general theories which dominate the discussion of the denial of justice in either the wider or the narrower use of that phrase.

The first theory is that aliens have no rights which any one must respect or which their own country can properly enforce. This view, which appears to be at most a mere theory, must have had its origin partly in primitive hostility to aliens and partly in an extravagantly and precociously developed conception of territorial sovereignty. It is a doctrine conceived as an hypothesis by scholarly writers;[11] but the quotations from Cicero with which this paper began show that two thousand years ago it was a doctrine which the Romans did not permit other nations to follow,[12] and there is no necessity for proving by reason and by history that it is a view which no civilized people can hold. For the sake of brevity, it may be termed the barbaric theory.

The second theory is that aliens have a right to be protected both by the country where they are and by the country of their citizenship, a doctrine which bears some relation to the old conception that one carries around with him his own personal law, and some relation to the conception even now entertained of a sovereignty over persons rather than over boundaries, and a much more obvious relation to the discoveries that commerce is advantageous to both parties and that justice is the right of every man everywhere and that govern-

[11] For example, by Blunschli, *Le Droit International Codifie*, Sec. 386 .

[12] *Quære* whether from the existence at Rome of a *prætor peregrinus* and of respect for *jus gentium* it can be inferred that the Romans conceded justice to aliens as a matter of international right.

ments are societies organized for the purpose of making this right secure. This may be termed the moral theory.

The third theory, and the one now dominant in practice, is that the alien voluntarily residing in a country not his own must be understood to accept the ordinary risks of life in that country, that except in extraordinary instances the practices of every department of that country's government must be deemed right, or at least reasonable, and that in extraordinary instances there may be interposition by the country of citizenship for the purpose of securing humane treatment and especially for the prevention of discrimination. This third view, which may be called the practical theory, though it leads to much the same result as the first and least humane of all the theories, the one which I have ventured to call barbaric — namely, that the alien is largely at the mercy of the country of his residence — is based upon a recognition that to-day every civilized country is anxious to do justice to aliens, both from a sense of duty and from a perception of interest. This third theory is peculiarly appropriate when one is dealing with denial of justice in the narrow sense of shortcomings, active or passive, by the judicial department; for courts, in addition to having the wish to do justice, are composed of scientific persons to whom justice is a profession, and hence when question is made as to the action of courts there is a peculiarly strong presumption that in every instance, whether a foreigner is concerned or not, justice is done.

Yet it is necessary to digress for a moment in order to answer the inquiry whether there are not several sorts of judicial or *quasi*-judicial tribunals as to whose acts towards aliens there is a well-recognized suspicion of the possibility of unfairness, a suspicion so common that interposition by the country of citizenship is frequently sought and not seldom given. There are indeed such tribunals. Thus the decisions of courts of claims have not been deemed sacred; and the reason is obviously that such tribunals are merely instrumentalities through which a government, without any necessity of yielding obedience or even of recognizing a consistent principle, passes upon the question of its own moral responsibilities. Careful and conscientious as are the courts of claims of some countries, it

must be conceded as a matter of practice that from the point of view of international law these decisions are less weighty than those of courts dealing with disputes between individuals. Nor do the decisions of those administrative courts which in some countries deal with the acts of executive officials receive great respect when an alien is a party in interest; for such courts, though enforcing the duties of officials towards private individuals, are in reality administrative commissions organized for the purpose of securing proper performance of official duties toward the government as well, and hence they are subject to the suspicion of being dominated by the executive department. Further, though in countries using the Anglo-American system of law public officials are exclusively amenable not to administrative courts, but to courts of the ordinary sort, there is inevitably an impression that here also there is in such cases a tribunal with a twist. Thus it happens that claims based on the misconduct of the government itself or of its officials, whether passed upon by courts of claims or by administrative courts or by courts of the ordinary sort, do not receive in international law precisely the same treatment as claims based on the denial of justice in the course of ordinary litigation. Again, the same is true of courts-martial, these being really commissions of the executive department performing some of its military functions. Finally, the decisions of courts of prize are also regarded with suspicion,[13] and deemed a not inappropriate place for interposition by an alien's home government and even for revision by a permanent court with international jurisdiction. The interest of the country to which the prize court belongs is so obvious that this last instance, like the others which have been mentioned, can hardly be called an exception to the general rule that to-day judicial decisions, even though unfavorable to aliens, receive high respect and should almost conclusively be presumed to be fair.

The rapid survey which has been taken of denial of justice in the wider of the two meanings of the phrase has resulted, it is trusted, in indicating the mode in which denial of justice in the narrower meaning, that is to say, denial of justice by the judicial department,

[13] Holzendorf, *Éléments de Droit International Public*, Sec. 78; 2 Oppenheim's International Law, Secs. 437–438.

should be treated; and now an attempt will be made to phrase the general doctrines derivable from the treatment heretofore accorded to such cases by diplomatic agencies and particularly by the State Department of the United States. The doctrines, it will be found, aim to secure justice, and aim to secure it through dignified diplomatic interposition in a fashion which will not provoke international jealousies by appearing to emphasize differences in national power or to claim for aliens greater privileges than are reasonably to be enjoyed by citizens. The day is past when any nation can insist upon the establishing of courts of peculiar constitution for aliens. Nor can any nation insist that its own favorite procedure — trial by jury, for instance — shall be the right of its citizens throughout the world. No, the practice of diplomacy in this matter is temperate in both form and substance.

It happens that instances of denial of justice in the narrower sense are not numerous and are usually intermingled with instances of denial of justice in the wider sense, and also that the practice has varied from time to time even in cases with similar circumstances.[14] Nevertheless, it is safe to say that when citizens resident abroad suffer denial of justice in cases that come, or that ought to come, before courts, good practice is as follows:

I. The alien, whether as plaintiff or as defendant, is entitled to as favorable treatment as is given to a resident citizen.[15]

II. The alien is entitled to no more enlightened procedure than is accorded to the citizen, unless that procedure is so cruel or unjust as to lose the right to be termed judicial.[16]

III. The alien must usually carry the case through the proper courts, both original and appellate.[17]

[14] Instances are collected in 3 Moore's International Arbitrations, 3073–3234, and 6 Moore's Digest of International Law, 651–1037, and Foster's Practice of Diplomacy, Chap. XVIII.

[15] Mr. Fish, Secretary of State, quoted in 6 Moore's Digest of International Law, 698.

[16] Mr. Forsyth, Secretary of State, quoted in 6 Moore's Digest of International Law, 652–653.

[17] Mr. Jefferson, Secretary of State, quoted in 6 Moore's Digest of International Law, 651–652; Mr. Clay, Secretary of State, quoted *ibid*, 652; Mr. Hay, Secretary of State, quoted *ibid*. 672–674 and 675–676.

IV. The alien need not carry the case through the courts if the courts are closed to him or if resort to them would be obviously useless.[18]

V. After the courts have been resorted to as far as is appropriate, the alien should complain to the executive department of the country of his residence.

VI. The complainant should next, or simultaneously, submit a memorial to the executive department of the country of his citizenship, stating the case and praying interposition.

VII. The interposition is made by executive department to executive department through diplomatic channels.

VIII. If the interposition leads to no satisfaction, there may be, of course, recourse to any one of the measures for settling international differences; but at the present time the most appropriate mode available is arbitration.[19]

IX. The result, in case the alien proves his claim, must be satisfaction from executive department to executive department, the satisfaction eventually reaching the alien himself in the form of an indemnity.

So much for the doctrines as they actually exist. In the future, whenever cases of denial of justice through the shortcomings of courts are sent to an international tribunal, it is to be hoped that they will be sent to a tribunal of a judicial as distinguished from a merely arbitral nature, for these cases are peculiarly appropriate to be dealt with by scientific persons, should lead not to compromise, but to exact justice, and should ripen into useful precedents for the guidance of all countries and of the tribunal itself.

The normal steps then, combining present practice with future probable development, should be litigation in and through the original and appellate courts of the country of residence, a complaint to the executive department of that country, a memorial to the executive department of the country of citizenship, interposition by that

[18] Lord Palmerston, addressing the House of Commons on the case of Don Pacifico, quoted in 6 Moore's Digest of International Law, 681–682.

[19] Formerly the standard procedure was to grant to the injured person letters of marque and reprisal. See Grotius, *De Jure Belli ac Pacis*, III, 2, 4 *et seq.*, 3 Moore's International Arbitrations, 3162.

country, a proceeding in an international tribunal of a judicial nature, and satisfaction by the executive department of the country of residence, acting through the executive department of the country of citizenship.

In passing, it should be noticed that in one respect a proceeding in an international judicial tribunal will almost necessarily differ from an ordinary proceeding of an appellate nature, as what will be obtained will naturally be not a reversal of the judgment below, but simply a decision which will result in the giving of satisfaction by the government responsible for that defective judgment. To be sure, any nation which sees fit may adopt as part of its judicial system a provision that a judgment to which an alien is a party in interest shall be conditional upon possible action by an international tribunal; but save in prize cases such a provision is extremely impossible, and with the same exception it is distinctly undesirable, for the reason, among others, that to the nation and to aliens also little but harm can come from an impression that aliens belong to a favored class and are above the ordinary law.

Yet though even in international tribunals of a judicial nature proceedings as to denial of justice must thus differ from proceedings under writs of error from the Supreme Court of the United States to the State courts, nevertheless, throughout the discussion as to denial of justice to resident aliens, the lawyer is necessarily reminded of several features of the United States Constitution — the jurisdiction given to the federal courts in cases where there is danger of injustice by reason of the parties being citizens of different States, and the provisions of the Fourteenth Amentment that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The justice which the Constitution of the United States attempts to secure for all persons within the national boundaries distinctly resembles the justice which every nation wishes to secure for its citizens everywhere.

The necessity for doctrines as to denial of justice arises, of course, wholly from the fear that prejudices based on differences in race or in country may lead to unfairness in practical matters. Does any

one really doubt the reasonableness of that fear? Surely not, although one may well insist that such prejudices are less dangerous than they once were. In 1760 a testator who was chief justice of the Vice Admiralty Court of the Colony of New York, and who lived not more than twenty miles from the sister Colony of Connecticut, left a will containing this passage:

It is my desire that my son, Gouverneur Morris, may have the best education that is to be had in England or America, but my express will and directions are that he be never sent for that purpose to the Colony of Connecticut, lest he should imbibe in his youth that low craft and cunning so incident to the people of that country, which is so interwoven in their constitutions that all their art cannot disguise it from the world, though many of them, under the sanctified garb of Religion, have endeavored to impose themselves on the world for honest men.[20]

What wealth the testator left to that son I do not know; but I perceive that to you and me the testator inadvertently left a valuable mile-stone wherefrom we can measure a great part of the progress which in the intervening one hundred and fifty years mankind has made in charity and wisdom. Yet until the millenium comes prejudices like those frankly expressed by that New York judge must emerge now and then, and hence it happens that this topic of the denial of justice continues to have practical importance.

The conclusions to which this discussion leads are:

First, that by reason of constant advances in judicial machinery and in international good will the place which denial of justice in the courts occupies in the much larger subject of protection to citizens residing abroad is a place of diminishing area;

Secondly, that this topic, by reason of the simplicity of the propositions, to which it can be reduced, is peculiarly capable of being codified;

Thirdly, that by reason of the similarity which the questions of law and of fact involved in disputes as to denial of justice in the courts bear to the questions adjudicated in ordinary national tri-

[20] Yale Alumni Weekly, Vol. 13, p. 337; Jared Sparks' Life of Gouverneur Morris, Vol. I, p. 4, note.

bunals, there is here a peculiarly appropriate occasion for resorting ultimately to international tribunals of a judicial as distinguished from an arbitral or diplomatic nature;

Fourthly, that thus it happens that this narrow topic, almost because of its very narrowness, becomes of peculiar importance as naturally leading to the adoption through international agreement of machinery — namely, codification and courts — whereby ultimately matters of much greater delicacy and practical importance may be so dealt with as to promote justice, international understanding, and peace.

The CHAIRMAN. This topic will be continued by Mr. Walter S. Penfield.

ADDRESS OF MR. WALTER S. PENFIELD, OF WASHINGTON, D. C.,

ON

The Place of Denial of Justice in the Matter of Protection.

In discussing the question of the place of denial of justice in the matter of protection, the subject logically resolves itself into, first, the duty of a nation to extend protection when there is a denial of justice to those of its subjects residing under the sovereignty of a foreign state; and, second, the basic elements constituting a denial of justice for which international intervention may be exercised.

I. THE DUTY OF A NATION TO EXTEND PROTECTION TO ITS CITIZENS.

Vattel says that whoever uses a citizen ill, indirectly offends the state, which is bound to protect the citizen, and should, if possible, oblige the aggressor to make full reparation.[1] And Pradier-Fodéré says that it is the duty of every state to protect its citizens abroad, and that it owes them this protection when the foreign state has proceeded against them in violation of principles of international law.[2]

When its citizens go abroad, a state claims the right to protect

[1] Vattel, Law of Nations, Ch. VI, Sec. 71.

[2] Pradier-Fodéré, Traite de Droit International Public, I, Secs. 329–354.

them, notwithstanding they fall at once under the territorial supremacy of a foreign state. This right is usually exercised when a wrong has been committed which the foreign state refuses to remedy.[3]

Although the acts of a sovereign, which are not conformable to international law, may be binding upon his own subjects, it does not follow that they are binding upon the subjects of other states. Their government has the right to demand redress for the unjust act "whether it proceed from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals." [4]

Where there has been a denial of justice to an alien, his home government is justified in holding the foreign government responsible, for, under the law of nations, a

government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor.[5]

It may, therefore, be said that protection should be granted by states to their citizens, when they have been maltreated by the administrative officers of a foreign state, provided proper legal redress either can not be obtained through local courts, or the means of obtaining such redress has been exhausted in vain; and that as between their subjects and other individuals, states should insist that the protection of such foreign state and the justice of its courts should be extended equally to their subjects, if said courts are guilty of serious acts of injustice.[6]

II. DENIAL OF JUSTICE.

"Justice," says Vattel, "is the basis of all society." [7] Calvo defines justice as "rendering to each one his due, respecting the rights of another, while also conforming our own actions to the

[3] Oppenheim, Int. Law, I, p. 374.
[4] Moore, Int. Law Dig., VI, p. 697, with citations.
[5] *Ibid*, p. 655, with citations.
[6] Hall, Int. Law, 5th ed., p. 278.
[7] Vattel, Law of Nations, Ch. V, Sec. 63.

law;" [8] and he defines a denial of justice as "every refusal to give any one his due." [9]

Sir Travers Twiss says that

International justice may be denied (1) by the refusal of the nation either to entertain the complaint at all or to allow the right to be established before its tribunal; (2) or by studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal; or (3) by an evidently unjust and partial decision.[10]

While it is true that those who resort to foreign countries are bound to submit to their laws, the exception to this rule is that when palpable injusice, that is to say, such as would be obvious to all the world, is committed by that authority towards a foreigner, for alleged infractions of municipal law, of treaties, or of the law of nations, the government of the country whereof the foreigner is a citizen or subject has a clear right to hold the country whose authorities have been guilty of the wrong accountable therefor.[11]

The right of intervention when there is a denial of justice is a question for the determination of the diplomatic forum of a government.

As an individual seeking protection is a member of the society of which the state is composed, every state may exercise the right of intervention when such individual is wronged in his person or property, or it may at its discretion decline to do so for state reasons.[12]

It is thus for the diplomatic forum of a government to determine whether it will take diplomatic jurisdiction or whether it will decline to do so on the ground that the claimant had or had not adequate remedies, and had or had not fairly tried and exhausted them; or whether those remedies were real or illusory; and so determine

[8] Calvo, Dictionnaire de Droit International, p. 418. This definition was evidently taken from *The Institutes of Justinian*, who, in turn, quotes from *Ulpian's Rules*. See Abdy & Walker Inst. Just., p. 1.

[9] *Ibid*, p. 237.

[10] Twiss, Law of Nations, Part 1, p. 36.

[11] Wharton, Int. Law Dig., II, p. 613, with citations.

[12] Oppenheim, Int. Law, I, p. 375.

whether a government has a right under international law to hear the appeal, take jurisdiction and intervene. The right of diplomatic intervention in cases of a denial of justice, is one of the high prerogatives of sovereignty; a right which in the nature of things must rest in the discretion of every sovereign; and every respecting government will decide for itself the question of its discretionary right to intervene in any given case. It would thus be politically impossible to submit to judicial review the exercise of diplomatic discretion to intervene in such cases because it would defeat the supreme object of intervention by paralyzing the protecting arm of the sovereign.

The exhaustion of local remedies in cases involving denial of justice.

The state should interfere in behalf of its citizens when the laws of a foreign state are oppressive *per se,* when they are unjustly administered, or when they make possible the commission of wrongs, without providing a remedy. When the government having itself committed a wrong, has such control over the courts as to ensure a denial of justice to the foreigner, or where its act is of a flagrant character, a state is justified in taking such steps as may be proper to secure immediate protection to its citizens.[13] But where there is a competent judiciary, in which the procedure is fair, and to which the same access is given to foreigners as is given to subjects, then the complaint for pecuniary redress must be made to such judiciary.[14]

It is a well-settled principle of international law that where a citizen of one state deems himself wronged by the action of another state's court to which he is admitted to equal privileges, he can not call upon his own government for diplomatic intervention until he has exhausted all means of redress, by appeal or otherwise, in the courts of the state complained of, and then he can only invoke the aid of his government in case of a manifest denial or failure of justice.[15]

[13] Hall, Int. Law, 5th ed., p. 279.
[14] Moore, Dig., VI, p. 699.
[15] *Ibid,* p. 669, with citations.

In his opinion in *The Tax Seizure* case, in the claim of John D. Metzger and Company *v.* Hayti, Judge William R. Day, as arbitrator, in discussing the right of a state to intervene before the claimant has exhausted his local remedies, held:

As a general proposition it is settled international law that a government will not intervene in claims against foreign governments when redress may be had in the courts of that country. If there has been a substantial denial of justice or a gross miscarriage thereof sanctioned and approved by the opposing government, a nation will then intervene.[16]

It was contended by the United States in the case of the *Rebecca* that

in view of the fact that the prior proceedings had been so palpably arbitrary and unjust, the master and owner were not bound to attempt further judicial remedies in the local tribunals.[17]

And Secretary of State Hamilton Fish held in another case:

Justice may as much be denied when, as in this case, it would be absurd to seek it by judicial process, as if it were denied after having been so sought.[18]

Lord Palmerston in a speech in the House of Commons said:

There may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said, " We do not apply this rule (the exhaustion of local remedies) to countries whose governments are arbitrary or despotic, because there the tribunals are under the control of the government, and justice can not be had; and, moreover, it is not meant to be applied to nominally constitutional governments, where the tribunals are corrupt."

Lord Palmerston then states that the broad doctrine is, that, in the first instance, redress should be sought from the law courts of

[16] Foreign Relations of the U. S., 1901, p. 275.
[17] Moore, Dig., VI, p. 667, with citations.
[18] Wharton, Dig., p. 618, with citations.

the country; but that in cases where redress can not be so had, to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive.[19]

It would seem, then, that it may safely be said that it is not necessary to exhaust local remedies in a foreign state where justice is absolutely wanting.[20] Nor is it necessary, where the offending government in its diplomatic negotiation with the government whose citizen has been injured makes statements or acts in such a way with reference to the injury as to relieve the party from seeking redress in the courts.[21]

Intervention for denial of justice in contractual cases.

While the United States most frequently intervenes in cases of wrong and injury to person and property, such as the common law denominates torts and regards as inflicted by force and not the results of voluntary engagements or contracts,[22] it will also support the contractual claims of its citizens against foreign powers, when the citizens holding such claims are denied a judicial remedy against it.[23]

Secretary of State Lewis Cass said that under ordinary circumstances when citizens of the United States go to a foreign country they go with an implied understanding that they are to submit themselves in good faith to its established tribunals. The case, however, is different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice.[24]

International commissions have frequently allowed claims based

[19] Moore, Dig., p. 681, with citations.

[20] *Ibid*, p. 677, with citations.

[21] *Ibid*, p. 682, citing 13 Op. Atty.-Gen., 547.

[22] Wharton, Dig., II, p. 656, with citations.

[23] For. Rel., 1888, Part I, p. 136.

[24] Mr. Cass, Secretary of State, to Mr. Webb, December 7, 1867. MSS. Inst. Brazil, cited by Wharton, Dig., II, p. 615.

on the infraction of rights derived from contracts where the denial of justice was properly established.[25]

A plan sometimes adopted to defeat the right of a government to protect its nationals is to stipulate, in a franchise or concession, that diplomatic intervention shall not be resorted to in case of differences arising between the government and the concessionaire in respect of the contract, and a clause is inserted in the contract providing for the method of local arbitration in case a dispute may arise. A consideration for the agreement to renounce diplomatic intervention is the agreement to arbitrate. When this agreement is set aside and annulled by the arbitrary or unlawful act of an executive, he generally pleads as against diplomatic intervention that the concession provides redress in the shape of arbitration. But the government having violated the agreement can not rightfully or legally appeal to that same agreement in support of its own wrong. It is because of such action constituting a denial of justice that the government of the national is justified in extending diplomatic intervention.

When questions arise as to whether such a contract is being faithfully executed, a declaration of forfeiture should not possess any binding force unless pronounced in conformity with the provisions of the contract, if there are any; or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the government that the proceeding has been just and that the decision ought to be submitted to.[26]

We find that national liability for denial of justice existed in the *El Triunfo* case, because the decrees of the president and the acts of the bankruptcy court were illegal under the laws of the state and therefore illegal under the law of nations. These were avowed and upheld by the government, which made possible an undue discrimination of justice, for which only illusory remedies were afforded.[27]

[25] Moore, Dig., VI, 718, referring to Moore, Int. Arb., IV, 3425–3590; Lawrence's Wheaton (1863), 510; Phillimore, 3d ed., II, 8; and Rivier, Principles du Droit des Gens, I, 272.

[26] Mr. Cass. Secretary of State, to Mr. Lamar, July 25, 1858, MSS. Inst. Am. St., cited by Wharton, II, p. 661.

[27] Report of William L. Penfield, Solicitor for Dept. of State, to John Hay, Secretary of State, 1901, in Salvador Commercial Company case.

Although a person holding a concession agrees by its terms to refer all doubts to the local courts, whose decision shall be final and binding, and shall not be the subject of an international claim, the claimant's country has the right to intervene in case of denial of justice or undue delay in its administration.[28]

Denial of justice by the coordinate branches of a government.

A state is responsible for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the government, so far as the acts are done in their official capacity.[29]

There would be a judicial denial of justice, affording grounds for diplomatic intervention, when a court needlessly delays in the trial of a citizen;[30] when it closes to an alien litigant some given channel of recourse which is open to a native and does not leave open some equivalent recourse;[31] when an alien has obtained a money judgment against the country in which he is residing and the same remains unsatisfied for an unreasonable length of time;[32] or when a foreign judge renders a fraudulent judgment against an alien citizen.[33]

But a government can not be held responsible for the mistakes of its courts, and certainly should not be when the party complaining has not exhausted all the means within his reach of correcting the errors that may have been committed.[34] Nor is it responsible to a foreign government for an alleged erroneous judicial decision rendered to the prejudice of a subject of said foreign government, unless the subject having made a full and *bona fide* defense, has carried his case to the court of last resort without obtaining justice. Then only could his home government properly intervene.[35]

A foreigner is subject to the criminal as well as the civil laws of the country within which he resides, and his government could not

28 Woodruff Case, Ralston's Report, p. 151.
29 Halleck, Int. Law, I, p. 442.
30 Wharton, Dig., II, p. 637, with citation.
31 For. Rel., 1885, p. 517.
32 For. Rel., 1904, p. 678.
33 Wharton, Dig., II, p. 615, with citations.
34 Moore, Dig., VI, p. 659, with citation.
35 *Ibid*, p. 652, with citations.

make proceedings against him a ground of complaint, unless the laws are contrary to treaty stipulations, or are used in bad faith or oppressively to inflict injuries upon him.[36] All that can be asked of a foreign government, or that can be demanded as a right, is, that in her proceedings against the citizens of the interposing country, who are being prosecuted for offenses committed within her jurisdiction, it should give them the full and fair benefit of its system, such as it is, and deal with them as it does with its own subjects or those of other foreign powers.[37]

Phillimore says:

A plain violation of the substance of national justice, for example, refusing to hear the party or to allow him to call witnesses, would amount to the same thing as an absolute denial of justice.[38]

Accused persons should be apprised of the specific offense with which they are charged; should be confronted with the witnesses against them; have the right to be heard in their own defense, either by themselves or counsel; in short, they should have a fair and impartial trial.[39]

And where there is unjust discrimination subjecting the citizen to peculiarly harsh imprisonment, or other injuries,[40] or where he is unlawfully imprisoned by military authorities, the local courts refusing to grant protection, there would be judicial denial of justice forming the basis of a claim for damages against the government of such foreign state.[41]

The right to protect subjects abroad gives to a government the means of guarding them against the effect of unreasonable laws, of laws totally out of harmony with the nature or degree of civilization by which a foreign power affects to be characterized.[42] For legislatures have passed laws so unjust and unreasonable in their reading

[36] Wharton, Dig., II, p. 614, with citation.

[37] *Ibid*, p. 614, with citation.

[38] Phillimore, Commentaries upon Int. Law, II, p. 5.

[39] Wharton, Dig., II, p. 623, with citation.

[40] *Ibid*, p. 618, with citation.

[41] Ralston's Report, p. 764. Case of Tagliaferro.

[42] Hall, Treatise on the Foreign Powers and the Jurisdiction of the British Crown, Sec. 5.

as to convince even the mind of a layman that they were framed for the sole purpose of evading national responsibility in cases of denial of justice.

The congress of a sister republic enacted a law that every foreigner was obliged to obey the laws and authorities of the republic, and to obey the decisions and sentences of the tribunals, without other recourse than those given by these same laws to its own citizens.[43] The object of that provision was, of course, to cut off the right of intervention, even though there should be a flagrant denial of justice by a court of last resort. Since their citizens had no recourse to a foreign government for protection in such a case, under this law foreigners were denied such recourse to the protection of their own government.

The same congress expressly enacted a law in relation to foreigners for the evident purpose of defining clearly the meaning of the term "denial of justice." The law reads as follows:

There is a denial of justice only when the court shall refuse to make a formal decision on the principal matter in dispute or on any incidents of the case. The mere fact that the judge has rendered a decree or sentence, of whatever nature, does not give the right of appeal as for a denial of justice even though the decision is iniquitous and given against express law.[44]

It is quite evident that the despotic maxim — *the will of the prince is law* — was thus clothed in the extraordinary form of a legislative precept, that the ignorance, the caprice, the prejudice or the malice of any petty judge was justice to the foreigner. According to this law, judgment against express law was justice, and malice or hatred was justice, if meted out by the judge to the foreigner, provided it was embodied in a formal decision. Thus it can be seen that, under this statute, judicial injustice to foreigners was legislatively declared to be impossible.

The congress of another country enacted a statute which provided, among other things:

That neither natives nor foreigners shall have any right of in-

[43] Ley de Extranjeria del Salvador, 1886, 4th ed., Ch. IV, Art. 38.
[44] *Ibid*, Art. 40.

demnity for losses or damages caused by the government in its military operations or in the measures it may adopt in the restoration of public order;

That the nation is not responsible for losses or damages consequent upon measures adopted by the government toward natives or foreigners for their arrest whenever the exigencies of public order require such action.

It also provided that "indemnities not prohibited as aforesaid, could only be made in conformity with the law of public credit and upon a previous judgment by a competent judicial officer."

The effect of this law, if carried to successful execution, would be to deny to aliens the protection of their own government against arrests, imprisonments, and confiscations in many aggravated cases, and in others to defeat their substantial claims to the reduction of their damages or the delays studied by judges appointed and dominated by the chief upon whose authority and in whose behalf the wrongs were done.

With respect to this statute the State Department held that it was "subversive of all the principles of international law;" that the country thereby placed "herself outside the pale of international intercourse;" and that the United States could never acquiesce in any attempt on the part of the government to use such a statute as an answer to a claim which this government has presented.[45]

The rule requiring the exhaustion of all judicial remedies in pursuit of justice would have no reason or application in cases arising under these laws, for it would be useless to seek justice.

A denial of justice may be made possible and result from the promulgation by an executive of a discriminatory and inequitable decree. The president of another country issued a decree prescribing the mode of presenting claims whether of natives or foreigners, and providing that if the claimant exaggerated the injuries suffered by him he should forfeit his claim and incur a heavy fine or imprisonment. The effect would be, of course, to deter claimants from the prosecution of their claims on account of the hazards contingent on their prosecution. Secretary of State Hamilton Fish let it be

[45] For. Rel. U. S., 1888, Part 1, pp. 490–1, Laws of Ecuador, 1888.

understood that the Government of the United States would not consent to the enforcement of such laws against its citizens.[46]

Conclusion.

It is thus seen that there may be a denial of justice in both civil and criminal causes, in cases arising *ex contractu* as well as *ex delicto,* and that such denial may arise and be made possible by virtue of unreasonable legislative enactments or the promulgation of unjust executive decrees.

But cases may arise in which one is not quite sure that there has been a denial of justice justifying diplomatic intervention. Especially is this true when relief has not been sought in local courts. Under such conditions when redress has been denied by a foreign government, the propriety of the action of the state of the injured individual either toward the foreign state in support of the claim of its citizen or in refusing to take diplomatic action in support of the claim, must depend on the particular facts of each case.[47] And the merits of the individual case and the judgment of the state concerned will determine in just what way and just how far the right of protection ought to be exercised.

(At 11:30 o'clock a. m. the Society adjourned until 2:30 o'clock p. m. of the same day.)

AFTERNOON SESSION.

(Saturday, April 30, 1910.)

The Society met at 2:30 o'clock p. m., pursuant to adjournment. In the absence of the president and a vice-president, Prof. Geo. G. Wilson, of Brown University, a member of the Executive Council, took the chair.

The CHAIRMAN. The subject for discussion before the Society this afternoon is *Intervention for breach of contract or tort where the contract is broken by the state or the tort committed by the government or governmental agency.* Mr. R. Floyd Clarke is the first speaker on this subject.

[46] Decree of President Guzman Blanco of Venezuela, 1873.

[47] Hall, Int. Law, 5th ed., p. 279.